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Supreme Court, U.S.
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08-276 JUN 25 2008

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(1)

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID V. MORRIS

Petitioner,

--v--

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

David V. Morris
Petitioner Pro Se
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Question Presented for review

1. Whether the United States Court of Appeals or the Second Circuit affirmance of the judgment of the United States District Court for the Southern District of New York resulted in a ruling that contravene the Federal Tort Claim Act, as interpreted by the Supreme Court.

2. Whether the wrongful acts committed by the federal employees resulting in Petitioner's injury required the district court to settle his claim under the authority of the Federal Tort Claim Act by referring to New York State Law.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were as in the caption.

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Petitioner DAVID V. MORRIS respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, dated January 8, 2008 and March 28, 2008, affirming the judgment of the United States District Court for the Southern District of New York, dated July 10, 2006.

OPINIONS BELOW

The District Court's order is unreported and reprinted in the appendix hereto at pages A1-12. The District Court's order denying Mr. Morris's motion for reconsideration is unreported and reprinted at pages A13-15. The Second Circuit's decision is unreported and reprinted at pages A16-19. The Second Court's decision on petition for rehearing is unreported and reprinted at pages A20-21.

JURISDICTION

The District Court entered its order on June 5, 2006. The District Court entered its order denying Mr. Morris's motion for reconsideration on July 30, 2006. The Court of Appeals' decision was entered on January 8, 2008. The Court of Appeals' decision on petition for rehearing was entered on March 28, 2008. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. § 1346(b)(1) provides in relevant part:

> Subject to the provisions of Chapter 171 of this title, the District Courts, ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury ... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2671 provides in relevant part:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal Agency" includes the judicial branch of the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

STATEMENT OF THE CASE

On May 29, 2002, Petitioner filed a notice of appeal that was taken from a judgment of the United States District Court for the Southern District of New York. The judgment dated April 30, 2002 was entered upon the decision of District Judge Kimba M. Wood to grant summary judgment in favor of the opposing party and

dismissed Petitioner's state tort action. No other judgment was received by the Clerk's Office of the Second Circuit from the District Court.

On June 21, 2002, the original record on appeal ("roa") was received in the Records Room from the Case Management Team. On February 20, 2003, the case was scheduled for oral argument on April 17, 2003. However, prior to the set date for oral argument, the original record on appeal was removed from the Records Room on March 12, 2003 and delivered to the custody of a person named "Amy".

On April 15, 2003, Chandella Armstrong, Deputy Clerk of the Second Circuit, contacted Richard A. Levin, Esq. via telephone, and informed him that the parties are not required to appear for oral argument. Armstrong stated that the Court has decided that the matter will be deemed submitted, and that there will not be any oral argument on appeal. Armstrong then contacted Petitioner, via telephone, and told him that his appearance on April 17, 2003 will be unnecessary because the case will be decided without hearing oral argument. The communication made by Armstrong was reduced in writing

It was impossible for a panel of three judges to have met and agreed that oral argument was unnecessary and that the appeal would be decided without oral argument. This is because at the time Armstrong communicated to the parties, "Amy" was still in possession of the roa. Armstrong never returned it back to the Record Room for the judges to examine and determine whether oral argument was unnecessary.[1]

---

[1] There was no fact-finding hearing below to determine whether copies of the ROA had been made available to the judges.

"Amy" returned the roa back to the Record Room on May 16, 2003, one month after Armstrong contacted the parties.

On May 13, 2003, Armstrong had prepared, signed and issued a Summary Order dismissing the appeal. At the time the Summary Order was made, the roa was still being held by "Amy" which made it impossible for a panel of three judges to have determined the appeal upon a record. The Summary Order had not been entered into the record as an official decision of the Court.

On July 14, 2003, Petitioner had filed a petition for a panel rehearing and rehearing en banc. On July 29, 2003 an unidentified Case Manager placed a call to Circuit Judge Amalya L. Kearse's Chambers, inquiring on the petition for en banc vote sheet. The Case Manager was advised that Judge Kearse was out and the law clerk "Sam" did not know when she would be returning.

On August 13, 2003, the unknown Case Manager received a phone call from an unknown person in the Chambers of Judge Kearse, advising that Judge Kearse is on vacation. It was determined that upon her return, the vote sheet will be collected. On September 29, 2003, Case Manager Eileen Volpe received instructions from "Sam" to process the vote ballot without Judge Kearse's signature. The Case Manager warned "Sam" that if his vote is not received by the return date, a vote to deny will be entered on his behalf.

On October 21, 2003, a petition Order was prepared without authority of a panel of three judges in relation to Petitioner's petition. The petition Order was submitted to Motions Staff Attorney Laura Bass Penn for signature. After the Order was signed by Penn denying Petitioner's petition, it was filed with the clerk's Office on October 28, 2003. The Order was never entered into the record by the

Clerk and a notice of entry was never served upon Petitioner.

On November 29, 2004, Petitioner submitted his federal tort claim to the Administrative Office of the United States Courts seeking $25,000 in damages. On January 14, 2005, the Administrative Office denied Petitioner's claim on the ground that (1) it arises entirely from the performance of official duties integral to the judicial process, and (2) Appellant have not proven negligent on the part of a federal officer or employee that could give rise to tort liability under state law.

On July 12, 2005, the Cashier's Office of the District Court received Petitioner's complaint against the Government. Petitioner's First Cause of Action alleged that the Clerks denied him a statutory right to have his appeal processed and decided by a panel of three judges. Petitioner's Second Cause of Action alleged that the Clerk's Office prevented Petitioner's appeal from being orally argued and issued a fraudulent order purporting to be a decision of three judges. Petitioner's Third Cause of Action alleged that the Clerk's Office failed to process Petitioner's case according to the laws and rules governing appellate review.

On December 14, 2005, a conference was held before United States Magistrate Judge Ronald L. Ellis. On this same day, the Government moved the District Court before Judge Barbara S. Jones for an order dismissing the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. On February 10, 2006, Petitioner submitted a Declaration in support of an application for: (i) recusing or disqualifying Magistrate Judge Ellis, (ii) either rejecting or denying the Government's motion to dismiss, (iii) directing entry of

default judgment against the Government; and (iv) granting such other relief that is appropriate in the case.

On June 5, 2006, Judge Jones signed an Order denying Petitioner's motions and granting the Government's motion to dismiss the complaint. A1-12. Judgment was entered upon the Court's Order on July 10, 2006. On July 25, 2006, the Pro Se Office received Petitioner's application for reconsideration of the Court's Order. The Government declined to oppose the application. On July 30, 2006, Judge Jones signed an Order denying the application. A13-15. On September 5, 2006, the Pro Se Office received Petitioner's notice of appeal.

On December 13, 2007, Petitioner appeared before a two panel judge of the United States Court of Appeals for the Second Circuit for oral argument. At the hearing, the Court was trying to find out whether there is a claim that petitioner made which has a state non governmental suit equivalent which isn't misrepresentation. On January 8, 2008, a Summary Order was prepared, signed and issued by the Clerk's Office dismissing the appeal. A.16-19. No *de novo* determination has been made by the two panel Court in reaching its decision to dismiss the appeal.

On March 17, 2008, petitioner submitted for filing a petition for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure. Petitioner argued that the Court overlooked federal case law establishing petitioner's right to recover damage on the basis of the transaction or occurrence giving rise to a negligence action, notwithstanding the fact that one or more of the 28 U.S.C. § 2680(h) exceptions ("misrepresentation") may be collaterally involved.

Petitioner also argued that the Second Circuit overlooked the fact that the Clerk's Office breached a mandatory duty when (1) the roa was removed from the Clerk's Office without authorization pursuant to FRAP 45(d) and (2) the Clerk's Office canceled oral argument without authorization pursuant to FRAP 34(a)(2). On March 28, 2008, the Clerk's Office prepared, signed and issued an Order denying the petition without opinion. A20-21.

REASON FOR GRANTING THE PETITION

The Second Circuit Court of Appeals Has (1) Entered A Decision In Conflict With The Decision Of Other Circuit Court of Appeals On The Same Subject Matter And (2) Decided An Important Federal Question In a Way That Conflicts With Relevant Decisions of This Court

The Second Circuit Court of Appeals substantially adopted the reasons stated in the Order of Judge Jones and agreed that the district court lacked subject matter jurisdiction over Petitioner's claim. A20-21. Judge Jones, in addressing the merits of the Government's motion to dismiss Petitioner's claim for lack of subject matter jurisdiction, has divided the issue in three parts.

The first part focus on federal statutes referred to by Petitioner in his complaint which are relevant in assessing his claim that federal employees breached a legal duty owed to him. A7-9. Judge Jones' determined that the alleged violations of these statutes are not actionable because they do not create an implied right of action. A7-9.

According to the Sixth Circuit Court of Appeals, it has been held that federal regulation or statute may be

relevant in assessing breach of duty for Federal Tort Claim Act ("FTCA") purposes if, under state law criteria, it may be considered a kind of statute or regulation violation at which is negligence per se. ***See Schindler v. United States,*** 661 F.2d 552, 560 (1981). The Second Circuit Court of Appeals discussed the issue of "negligence per se" briefly in ***Chen v. U.S.,*** 854 F.2d 622, 627 (1988), when it ruled that in New York, the "unexcused omission" or violation of a duty imposed by statute for the benefit of a particular class "is negligence itself." (Citation omitted)

The second part focus on Petitioner's action brought under the Federal Tort Claim Act which is relevant in determining whether his federal tort claim is comparable to a cause of action against a private person recognized in the State of New York where the tort occurred. Judge Jones determined that "because the statutes invoked by plaintiff do not contain private rights of action, the violations alleged by plaintiff are not actionable under FICA." A9-10.

According to the Ninth Circuit Court of Appeals, it has been held that in order to recover under the FTCA, Petitioner "must show that the government breached a duty which it owed to him." ***See Goodwin v. United States,*** 517 F.2d 481, 482 (1975). "It is a general rule, that whenever one owes another a duty, whether such duty be imposed by voluntary contract or by statute, a breach of such duty causing damages gives a cause of action." Willy v. Mulledy, 78 N.Y. 310, 314 (Ct. App. 1879). ***See also, e.g., Amberg v. Kinley,*** 214 N.Y., 531, 108 N.E. 830 (1915); ***Central DiCaprio v. New York Railroad Co.*** 231 N.Y. 94, 131, N.E. 746 (1921); ***Motyka v. City of Amsterdam,*** 15 N.Y. 2d. 134, 256 N.Y.S. 2d 595, 204 .N.E. 2d 635 (1965).

The third part focus on individual liability where, although Petitioner does not name federal employees as individual defendants in this action, whether such individual would be immune from suit. A9-11. Judge Jones determined that Petitioner's claim against these individuals who interfered with his appeal would be barred by absolute judicial immunity

This Court has held in ***U.S. v. Gaubert***, 499 U.S. 315, 323, 111 S.Ct. 1267, 1274 (1991) that "[i]f the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." Thus, for Petitioner's complaint to survive the Government's motion to dismiss, "it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." Id. 499 U.S. at 324, 325.

The Second Circuit Court of Appeals has sanctioned Judge Jones's findings which has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power, in light of the foregoing summarized facts and law.

The Courts Below Failed To Determine Whether Petitioner's Cause of Action Is Comparable To A Cause of Action A Private Citizen Recognized In The Jurisdiction Where The Tort Occurred

The Second Circuit failed to follow its own ruling. ***Dorking Genetics v. U.S.***, 76 F.3d 1261 (1996), when it considered and found Petitioner Morris's arguments to be without merit on appeal. The Second Circuit in ***Dorking***

Genetics quoted the Supreme Court's ruling in *Rayonier Inc. v. United States*, 77 S. Ct. 374, 376 (1957), that "the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred."

Involved in Petitioner Morris's case is the alleged "lack of care" required of Staff and personnel in the clerk's office in carrying out a responsibility, leading to Petitioner Morris's injury. Under these circumstances, this Court has held that the Act requires a court to look to the State law liability of private entities, not to that of public entities, when assessing the Government's liability under the FTCA "in the performance of activities which private persons do not perform." *See U.S. v. Olsen*, 126 S.Ct. 510, 512, (2005), citing *Indian Towing Co. v. United States*, 76 S. Ct. 122 (1955).

In the Reply Brief for Petitioner Morris, it is argued that his cause of action against the Government is comparable to a cause of action against a court stenographer who has a dual role as an officer of the court and private individual. This particular argument is grounded in State Law where a court stenographer is an officer of the court at a trial but not at an examination before trial where he serves as an employee of a party. *See Lester v. Lester*, 69 Misc. 2d 528 (Sup. Ct. 1972). Also, a stenographer at a reference before a referee is not an officer of the court. *Van Valkenburgh v. Bishop*, 164 NYS 86, 87 (Sup. Ct. 1917).

At an examination before trial where a stenographer serves as an employee of a party, he is a private individual owing a legal duty of preserve the original stenographer notes when not filed with the clerk (Judiciary Law § 297); to preserve records of his

predecessor (Judiciary Law § 298); and to furnish gratuitously copies of proceedings to judges (Judiciary Law § 299). Thus, a court stenographer could be held liable under State law for failure to preserve original records and furnish copies to judges. Judiciary law imposes a statutory duty and a breach of such duty would lead to injury of not having a record available to review issues on appeal.

Petititioner Morris argued before the Second Circuit that this breach is comparable to conduct of the Government in question. The conduct of the Government involves alleged violations of federal statutory duties analogous to those imposed under New York Judiciary Law. Federal employees (1) removed the original records from the clerk's office without authority (FRAP 45(d)); (2) prevented a three panel judge from examining the records for determination as to whether oral argument was necessary (FRAP 34(a)(2)); and (3) determined the case without a panel of three judges or a majority of the circuit judges (28 U.S.C. 46(c)).

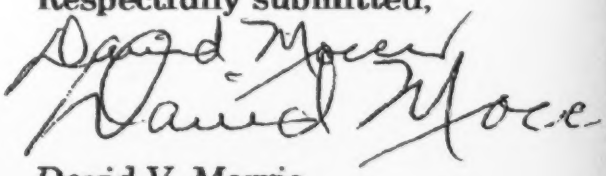
In applying the FTCA, the Courts below failed to use State law pertaining to private persons to determine if elements of any cause of action for tortuous injury are present in petitioner's complaint. Such failure, which is apparent in the record, require this Court to grant the petition for a writ of certiorari because the alleged federal violations constitute violations of duties "analogous to those imposed under local law."

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari and reverse the decision of the Court of Appeals for the Second Circuit with respect to the questions presented herein.

Dated: August 25, 2008

Respectfully submitted,



David V. Morris
Petitioner Pro Se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID V. MORRIS

Case No.
05 Civ. 6345 (BSJ)

Plaintiff,

versus

UNITED STATES OF AMERICA,

Defendants.

ORDER
(Filed June 5, 2006

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiff pro-se David V. Morris brings this action against the United States of America (the "Government") under the Federal Tort Claims Act, 28 U.S.C § 1346 ("FTCA"). The Government has moved to dismiss the Complaint for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12 (b) (1), or, in the alternative, for failure to state a claim pursuant to FED. R. CIV. P. 12 (b) (6). On February 10, 2006, plaintiff opposed the Government's motion and moved for (1) the recusal of Magistrate Judge Ellis, and (2) a default judgment

against the Government. By letter dated March 3, 2006, plaintiff moved for oral argument with respect to defendant's motion. For the reasons stated herein, plaintiff's motions are DENIED. The Government's motion to dismiss the Complaint is GRANTED.

Background

This action is based on plaintiff's allegations of misconduct in the Office of the Clerk of the Court for the United States Court of Appeals for the Second Circuit ("Circuit Court Clerk's Office") during the appeal of a previous employment action brought by plaintiff. Plaintiff was employed by United Parcel Service, Inc. ("UPS") until he was terminated on May 1, 1997. After arbitration, termination became final on June 28, 1997. Plaintiff subsequently brought an action in New York State Supreme Court, New York County, against (1) UPS and his former supervisor for unlawful discharge; and (2) his union for violation of its duty of fair representation (the "Morris I" litigation). That action was removed to federal court, and on November 21, 2001, the Honorable Kimba Wood, U.S. District Court Judge for the Southern District of New York, adopting a Report and Recommendation by Magistrate Judge Ronald Ellis, dismissed the plaintiff's complaint in its entirety. See Morris v. United Parcel Service, Inc., No. 98 Civ. 7353 (KMW), 2001 WL 705852 (S.D.N.Y. June 13, 2001). Plaintiff moved for reconsideration, which was denied on April 24, 2002. Plaintiff then appealed both the dismissal and the denial of reconsideration to the United States Court of Appeals for the Second Circuit. On May 13, 2003, a panel of that court consisting of Circuit Judges Amalya L. Kearse, José A. Cabranes, and Chester J. Straub dismissed Plaintiff's appeal of the dismissal as

untimely, and denied his appeal of his motion for reconsideration as without merit. On October 23, 2003, the Second Circuit denied Morris' motion for a rehearing en banc.

While appeal of Judge Wood's decisions in Morris I was pending, plaintiff filed another pro se action in New York State Supreme Court, Queens County (the "Morris II" litigation). In this action, plaintiff sued the same parties as in the Morris I lawsuit, along with UPS's attorney and his union's attorney from Morris I, plaintiff's own attorney in the arbitration, and the arbitrator himself. That action was also removed to federal court, this time to the Eastern District of New York, where it was dismissed, by Chief Judge Edward Korman, adopting a Report and Recommendation by Magistrate Judge Lois Bloom, on December 8, 2004. Appeal in that matter is currently pending.

The Complaint in this action was filed July 12, 2005, and grows out of the Morris I litigation. In this action, plaintiff alleges that a deputy clerk and a staff attorney in the Circuit Court Clerk's Office concealed plaintiff's appeal in Morris I from the panel of Circuit Judges assigned to hear it, decided and rejected plaintiff's appeal by themselves, and then prevented an en banc rehearing. Specifically, plaintiff alleges that on or around March 2003, the original record on appeal was removed from the Circuit Court Records Room and delivered to the custody of a Staff Attorney. This is confirmed by the docket sheet in Morris I, which notes that an individual from the Circuit Staff Attorney's Office took possession of the record. Plaintiff alleges that on April 14, 2003, he was informed by a Deputy Clerk of the Second Circuit that

Morris I would be taken on submission. Plaintiff alleges that this representation was fraudulent. According to Morris, the panel of judges assigned to his case could not have reviewed the record and determined that oral argument was unnecessary because the Staff Attorney who removed his file "never returned the record on appeal." Compl. at ¶ 10. Morris further contends that a Deputy Clerk, and not the panel of Circuit Judges assigned, alone decided his appeal. Id. at 13. Plaintiff makes similar claims with respect to his request for rehearing en banc.

Plaintiff brings this action under the Federal Tort Claims Act, and alleges that individuals in the Clerk's Office violated: (1) the Federal Rules of Appellate Procedure, including Rule 45(d), which prescribes record keeping and docket management by the Clerk of a Court of Appeals, and Rule 34(a), which provides for oral argument unless an appeal is frivolous, dispositive legal issues have recently been determined, or the facts and legal arguments are adequately presented in the written record; and (2) 28 U.S.C. §46(c), which requires a hearing or rehearing before a circuit court en banc if ordered by a majority of the judges of the circuit who are in regular active service.

On July 19, 2005, this Court issued an Order referring this action to Magistrate Judge Ellis for general pre-trial supervision. The Government has moved to dismiss plaintiff's claim for lack of subject matter jurisdiction and for failure to state a cause of action. In opposing the Government's motion, plaintiff cross-moved for (1) recusal of Magistrate Judge Ellis pursuant to 28 U.S.C. §455(b)(1), and (2) a default judgment.

Subsequently, plaintiff has also, by letter, requested oral argument with respect to the Government's motion.

Discussion

I. Plaintiff's Motions

A. Motion for Default

Plaintiff's Complaint was submitted for filing on July 11, 2005. A pre-trial conference Order was issued by Magistrate Judge Ellis on August 29, 2005, scheduling an initial pre-trial conference on December 14, 2005 to discuss matters including subject matter jurisdiction and schedules for discovery. Summons, complaint, and the pretrial order were served on the Government on October 27, 2005. Under FED. R. CIV. P. 12(a)(3), the United States, when named as a defendant in a civil action, shall answer or otherwise respond to the complaint "within 60 days after the United States attorney is served with the pleading asserting the claim." Defendant filed its motion to dismiss for lack of subject matter jurisdiction on the date of the pre-trial conference, on December 14, 2005, within 60 days of the execution of service on October 27, 2005. Accordingly, the Government is not in default.

B. Motion for Recusal

On December 14, 2005, at a pretrial conference before Magistrate Judge Ellis, plaintiff moved for the recusal of Magistrate Judge Ellis from this action. Magistrate Judge Ellis denied plaintiff's motion, which plaintiff now brings before this Court.

Under 28 U.S.C. §455(b)(1), a judge must be recused if he or she has "a personal bias or prejudice concerning a party" or "personal knowledge of disputed evidentiary facts concerning the proceeding." Magistrate Judge Ellis was assigned to plaintiff's previous case in this district, Morris I, and issued a Report and Recommendation in that case, which was adopted by Judge Wood, thus dismissing plaintiff's complaint in that action in its entirety. According to plaintiff, Magistrate Judge Ellis' role in that action demonstrates that the Magistrate Judge has "personal knowledge of disputed evidentiary facts" in this case. Plaintiff further claims that Magistrate Judge Ellis improperly "assigned himself to the [instant] case." (Morris Decl. at ¶ 9). As proof of this claim, plaintiff alleges that this Court's Order referring this action to the Magistrate Judge for general pretrial matters does not bear the name of a specific Magistrate Judge. Plaintiff concludes that Magistrate Judge Ellis assigned the matter to himself, which plaintiff apparently believes shows some sort of personal bias or prejudice against him on the part of Magistrate Judge Ellis.

First, despite plaintiff's concern regarding this Court's Order of Reference, the Order does in fact bear Magistrate Judge Ellis' designation "RLE." It is simply not the case that the Magistrate Judge improperly assigned himself to this case. See Order of Reference, dated July 19, 2005. Second, the mere fact that Magistrate Judge Ellis presided over prior proceedings involving the plaintiff does not show that the Magistrate Judge has knowledge of disputed facts relevant to this action, which involves a different defendant and is based on a entirely separate cause of action. The factual issues

in this case relate to plaintiff's allegation of misconduct at the Second Circuit Clerk's Office. Any knowledge of plaintiff's prior case, which involved allegations of wrongful termination asserted against plaintiff's employer and breach of fair representation asserted against plaintiff's union, are not relevant to the instant case for purposes of § 455. This Court cannot discern what "interest" in this case Magistrate Judge Ellis holds which would necessitate recusal. Accordingly, plaintiff's motion is denied.

II. Defendants' Motion to Dismiss

A. Legal Standard

A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b) (1) when the district court lacks the statutory or constitutional power to adjudicate it. See FED R. CIV. P. 12 (b) (1). In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12 (b) (1), a district court may refer to evidence outside the pleadings. See Kamen v. American Tel. & Tel. Co., 791 F. 2d 1006, 1011, (2d Cir. 1986). A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exits. See Malik v. Meissner, 82 F. 3d 560, 562 (2d Cir. 1996).

B. The Merits of Defendant's Motion

1. The Appellate Rules and the Judicial Code

Plaintiff alleges violations of the Federal Rules of Appellate Procedure and Judicial Code. However, neither the Appellate Rules nor the Judicial Code expressly creates a private right of action. Federal statutes that do not explicitly contain a private right of action will not be read automatically to entail such a right; in order to determine that a federal statute creates an implied right of action, the Court must look to four factors: (1) whether the statute was enacted to benefit a special class; (2) whether the drafters intended to create a private right of action; (3) whether a private right of action would be consistent with the purposes of the statute; and (4) whether the cause of action is one not traditionally relegated to the states. Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975). The burden of demonstrating Congressional intent lies with the plaintiff. County of Westchester v. New York, 286 F.3d 150, 152, (2d Cir. 2002) (per curiam) citing Suter v. Artist M., 503 U.S. 347, 363-64 (1992).

Here, plaintiff has made no effort to show that either the Appellate Rules or the Judicial Code create an implied right of action, and an independent examination by this Court reveals that they clearly do not do so. First, the Appellate Rules are proscribed by the United States Supreme Court pursuant to the Rules Enabling Act, 28 U.S.C. § 2071-2077 ("REA"), which clearly does not create a private right of action. In fact, the REA states that procedural rules proscribed by the Supreme Court "shall not abridge, enlarge or modify any substantive rights." 28 U.S.C. § 2072 (b). The Appellate Rules are purely procedural; as they do not confer substantive rights, they cannot create private rights of action. Similarly, the Judicial Code does not contain any provision establishing

a private right of action. Specifically, the provision of the Code under which plaintiff attempts to bring this action, 28 U.S.C. § 46(c), which sets forth rules for when a rehearing en banc is required, gives "parties no rights whatsoever to require en banc rehearing, or even a consideration by the full court of the suggestion." Thompson v. Calderon, 120 F. 3d 1045, 1069 (9th Cir. 1997 (en banc) (Kozinski, J., dissenting, citing Western Pacific R.R. Corp. v. Western Pacific R.R. Co., 345 U.S. 247, 256-59, 73 S. Ct. 656, 661-62, 97 L. Ed. 986 (1953); Notes of Advisory Committee on Appellate Rules following Fed. R. App. P. 35), rev'd 523 U.S. 538 (1998). Alleged violations of either the Judicial Code or the Appellate Rules are not actionable.

2. The Federal Tort Claims Act

Although plaintiff purports to bring this action under the Federal Tort Claims Act ("FTCA"), the FTCA does not create new causes of action; "for liability to arise under the FTCA, a plaintiff's cause of action must be 'comparable' to a 'cause of action against a private citizen' recognized in the jurisdiction where the tort occurred, and his allegations, taken as true, must satisfy the necessary elements of that comparable state cause of action." Chen v. United States, 854 F.2d 622, 626 (2d Cir. 1988) (citations omitted). Plaintiff has only alleged statutory violations and not common law torts. However, as described above, because the statutes invoked by plaintiff do not contain private rights of action, the violations alleged by plaintiff are not actionable under the FTCA.

While a plaintiff may not bring an action for violations of the Judicial Code or the Appellate Rules, in

light of plaintiff's pro se status, the Court will construe plaintiff's claim to assert a cognizable right of action. Essentially, plaintiff claims that he was denied a full and fair hearing of his appeal before the Second Circuit in the Morris I litigation, which may be understood as a constitutional claim for denial of due process under the Fifth Amendment to the Constitution of the United States. However, although a denial of due process is itself actionable (unlike the statutory violations alleged by plaintiff), a plaintiff may not bring such a constitutional claim in a civil case against the Government under the FTCA. The FTCA explicitly states that it does not waive sovereign immunity in any "civil action against an employee of the Government ... which is brought for a violation of the Constitution of the United States." 28 U.S.C. 2679(b) (2) (A). See also King v. Simpson, 189 F. 3d 284, 287 (2d Cir. 1999); Armstrong v. Sears, 33 F.3d 182, 195 (2d Cir. 1994). Claims of constitutional violations may not be brought under the FTCA against the Government itself. King v. Simpson, 189 F. 3d 284, 287 (2d Cir. 1999). Accordingly, plaintiff's claim, even if understood as an actionable claim for denial of due process, is barred by sovereign immunity.

3. Individual Liability

Although plaintiff does not name employees in the Circuit Court Clerk's Office as individual defendants in this action, the Court notes that even if plaintiff were to do so, those individuals would also be immune from suit. Of course, generally speaking, actions against a federal employee in his or her individual capacity may be premised on constitutional violations under Bivens v. Six Unknown Agents of Fed. Bureau of

Narcotics, 403 U.S. 388 (1971). However, judicial defendants have absolute immunity from civil liability for actions undertaken pursuant to their judicial power and authority. See Mireles v. Waco, 502 U.S. 9, 11-13 (1991) (per curiam); Forrester v. Whtie, 484 U.S. 219, 225-27 (1988). Judicial immunity is an immunity from the burdens of litigation, not just from ultimate assessment of damages. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). This immunity applies not only to judges themselves, but to others who perform functions closely associated with the judicial process. Olivia v. Heller, 839 F. 2d 37, 29 (2d Cir. 1988) (quoting Cleavinger v. Saxner, 474 U.S. 193, 200 (1985)). Included among these others are law clerks, clerks of the court, and other court personnel who assist judges in carrying out their discretionary judicial functions. See Rodriguez v. Weprin, 116 F. 3d 62, 66-67 (2d Cir. 1997) (clerk of the court entitled to judicial immunity); Glendora v. Lemle, No. 99 Civ. 922, 2001 WL 984926 at *1 (E.D.N.Y. July 10, 2001) (law clerks entitled to judicial immunity); Rudow v. City of New York, 642 F. Supp. 1456, 1461 (S.D.N.Y. 1986) (government staff attorneys in judicial proceedings entitled to absolute immunity). Accordingly, even if plaintiff were to bring his action against the individuals he alleges interfered with his appeal in Morris I, such a claim would be barred by absolute judicial immunity.

III. Request for Oral Argument

Having already determined that defendant's motion to dismiss should be granted, the Court is satisfied that oral argument would not be helpful in this matter, and exercising its discretion to decide the motion on the papers submitted by the parties, denies defendants' request for oral argument. See Doctor's Assoc., Inc. v.

Distajo, 66 F. 3d 438, 448 (2d Cir. 1995) ("Courts have broad discretion to determine how much, if any, oral argument is appropriate in a given case."); see also Greene v. WCI Holdings Corp., 136 F. 3d 313, 316 (2d Cir. 1998) (" the ' hearing' requirements of Rule 12 and Rule 56 do not mean that an oral hearing is necessary").

Conclusion

For the reasons stated above, plaintiff's various motions are denied. Defendant's motion to dismiss the case is granted.

The Clerk of the Court is directed to close this case.

SO ORDERED:

S/Barbara S. Jones
Barbara S. Jones
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
June 5, 2006

United States District Court
Southern District Of New York

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DAVID V. MORRIS

Plaintiff 05 Civ. 6345 (BSJ)

v. ORDER

UNITED STATES OF AMERICA

Defendants.

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BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

On June 5, 2006, this Court issued an Order granting the Government's Motion to Dismiss. The facts underlying this action are summarized in that Order, with which familiarity is presumed. By letter dated July 24, 2006, plaintiff pro-se David Morris now moves the Court for reconsideration of its prior Order. For the reasons stated herein, plaintiff's motion is denied.

Legal Standard

A motion for reconsideration pursuant to Local Rule 6.3 will be granted if the moving party presents factual matters or controlling decisions the court overlooked that might materially have influenced its decision. Pereira v. Aetna Casualty and Surety Co. (In re Payroll Express Corp.), 921 F. Supp. 1121, 1123 (S.D.N.Y.) 1996); Violette v. Armonk Assocs., L.P., 823 F. Supp. 224, 226 (S.D.N.Y. 1993). Reconsideration is also

appropriate in light of an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice. Doe v. New York City Dep't of Social Servs., 709 F. 2d 782, 789 (2d Cir. 1983); Casino, LLC v. M/V Royal Empress, 1998 WL 566772, at *1 (E.D.N.Y. 1998). Local Rule 6.3 is to be narrowly construed and strictly applied. See Caleb & Co. v. E.I. Du Pont De Nemours & Co., 624 F. Supp. 747, 748 (S.D.N.Y. 1985). A party in its motion for reconsideration "may not advance new facts, issues or arguments not previously presented to the court." Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc., No. 86 CIV. 6447 (JMC), 1989 WL 162315, at *3 (S.D.N.Y. 1989). In deciding a Local Rule 6.3 motion, the court will not allow a party to use the motion as a substitute for appealing from a final judgment. See Morser v. A.T. & T. Information Systems, 715 F. Supp. 516, 517 (S.D.N.Y. 1989); Korwek v. Hunt, 649 F. Supp. 1547, 1548 (S.D.N.Y. 1986).

Discussion

In this Court's prior ruling, I found that plaintiff's allegations of statutory violations were not actionable because the statutes invoked by plaintiff do not contain a private right of action. See Order 8-10. Moreover, to the extent that plaintiff's claim can be construed as a violation of his Due Process rights as guaranteed by the Fifth Amendment, such a constitutional claim cannot be brought under the Federal Tort Claims Act, 28 U.S.C. § 1346 ("FTCA"). See Order at 10-11. Finally, any individuals involved in a plaintiff's allegations are immune from suit. See Order at 12-13.

Nothing in plaintiff's recent submission disturbs this prior analysis. Although plaintiff repeatedly alleges violations of several of the Federal Rules of Appellate Procedures (see, e.g., Mot. For Recons. At 2-3), he does not deny that neither the appellate rules themselves nor the Rules Enabling Act, 28 U.S.C. §§ 2071-2077 ("REA"), create a private right of action. Furthermore, alleged violations of the Appellate Rules do not constitute a common law tort actionable under the FTCA.

Plaintiff has not identified factual matters or controlling decisions which he alleges that this Court overlooked in its previous decision, Pereira, 921 F. Supp. at 1123, nor has he cited an intervening change of controlling law or the availability of new evidence, Doe v. New York City Dep't of Social Servs., 709 F. 2d at 789. Rather, plaintiff seeks to relitigate the issues already decided by this Court by repeating the same facts and arguments raised in his opposition papers. The proper venue for a review of this Courts analysis is an appeal. Not a motion for reconsideration.

Conclusion

For the reasons stated above, plaintiff's motion is denied.

SO ORDERED

S/BY Barbara S. Jones
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
July 30, 2006

06-4586-CV
Morris v. United States of America

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER
Dated JANUARY 08, 2008

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITITAION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVIALABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW/CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY

OG THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moyniham United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of January, two thousand and seven.

PRESENT:

Hon. Guildo Calabresi
Hon. Sonia Sotomayor
Circuit Judges.

January 8, 2008

DAVID V. MORRIS

Plaintiff-Appellant,

v. No. 06-4586-cv

UNITED STATE OF AMERICA,

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* Judge José A. Cabranes, original a member of this panel, recused himself from consideration of this case. Accordingly, the appeal has been decided by the panel's remaining two judges pursuant to this Court's Local Rule § 0.14(b).

Defendant-Appellee.

FOR APPELLANT: DAVID V. MORRIS, pro se, East Elmhurst, N.Y.

FOR APPELLEE: MATTHEW L. SCHWARTZ, Assistant United States Attorney (Elizabeth Wolstein, Assistant United States Attorney, on the brief), for Michael J. Garcia, United States Attorney for the Southern District of New York, New York, N.Y.

UPON DUE CONSIDERATION of this appeal from a judgment of the United States District Court for the Southern District of New York (Jones, J.), it is hereby **ORDERED, ADJUDGED**, and **DECREED** that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant David V. Morris appeals from the July 10, 2006 judgment of the United States District Court for the Southern District of New York (Jones, J.), entered in accordance with the district court's June 5, 2006 order dismissing Morris's complaint for want of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

Substantially for the reasons stated by Judge Jones, we agree that the district court lacked subject matter jurisdiction over Morris's claim. We have considered all of Plaintiff-Appellant's arguments and have found them to be without merit. Accordingly, the judgment of the district court is **AFFIRMED**.

For the Court,
CATHERINE O'HAGAN WOLFE,
Clerk of the Court
S/by: Frank Perez

ORDER March 28, 2008

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O' Hagan Wolfe, Clerk of the Court

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 28th day of March two thousand eight.

Before: Hon. Guido Calabresi,
Hon. Sonia Sotomayor,

Circuit Judges.

David V. Morris,

Plaintiff-Appellant,

v.

ORDER
No. 06-4586-cv

United States of America,

Defendant-Appellees.

Appellant David V. Morris having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk
S/By Frank Perez
Frank Perez, Deputy Clerk